Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-647

WILLIAM H. PERKINS, ET AL,
Petitioners,

Versus

HIGHWAY PATROL DIVISION OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Fifth Circuit

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IN THE

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NO. .....

WILLIAM H. PERKINS, ET AL,
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HIGHWAY PATROL DIVISION OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court for the Middle District of Alabama.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Perkins v. Trooper Dan J. Sansome* (U.S.C.A., 5th, #76-2455, August 27, 1976) is not yet reported, but is included in the appendix hereto at Page A-1. The opinion of the District Court in the case is not re-

ported, and is included in the appendix here at Pages A-2 to A-3.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §254(1) and 28 U.S.C. §2101(c) to review the judgment of the Court below entered on August 27, 1976, in this private civil action. No order respecting rehearing below or an extension of time here has been entered.

QUESTIONS PRESENTED FOR REVIEW

This began as a multi-plaintiff, multi-defendant private civil action for damages brought in Federal Court in Alabama by Kentucky plaintiffs under theories of common-law negligence. Jurisdiction in the Trial Court was obtained by virtue of diversity of citizenship and amount in controversy (28 U.S.C. §1332). After discovery was partially completed, the United States District Court for the Middle District of Alabama entered an order on January 19, 1976, dismissing as party defendant the Highway Patrol Division of the Alabama Department of Public Safety. After some additional proceedings, plaintiffs voluntarily dismissed all other defendants and took this appeal as to the dismissal of the Highway Patrol Division.

There are two primary questions presented for review:

1. Do the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution permit the Highway Patrol Division of the Alabama Department of Public Safety to invoke a clause of the Alabama Constitution granting immunity for tort actions in order to avoid claims presented against the State by Kentucky plaintiffs seeking damages for severe injuries allegedly caused by State employees acting within the line and scope of their employment?

2. If Alabama's sovereign immunity constitutional provision does violate the Fourteenth Amendment of the United States Constitution, can the Kentucky plaintiffs invoke the power of the United States Federal Courts to restrain Alabama from invoking its sovereign immunity defense to avoid common-law liability for damages?

PERTINENT CONSTITUTIONAL PROVISIONS

Article I, §14 of the Alabama Constitution of 1901:

> That the State of Alabama shall never be made a defendant in any court of law or equity.

Article III, §2 of the Constitution of the United States:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, . . . [and] to all cases . . . between a state and citizens of another state; . . .

Amendment XI of the Constitution of the United States:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State; or by citizens or subjects of any foreign State.

Amendment XIV of the Constitution of the United States:

> Section 1—*Citizenship Rights Not to Be Abridged by States*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Section 5—*Power to Enforce this Article*—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

A Writ of Certiorari is sought to review the Fifth Circuit's affirmance of the District Court's dismissal of the complaint in this case as an unconsented suit against the sovereign State of Alabama by citizens of Kentucky.

The Kentucky plaintiffs were themselves, or were the parents of children who were, occupants of a motor vehicle traveling the public highways on an interstate trip through Alabama in the early morning hours of August 30, 1974. The complaint charges that each of the plaintiffs has suffered special damages resulting from a head-on collision between the Kentucky vehicle and an Alabama vehicle driven by a drunken driver. The Alabama driver, who died in the wreck, had a blood alcohol content on autopsy of .24 percent, which is legally drunk in Alabama and every other State in the United States. Forty-five minutes prior to the wreck, this same drunken driver had been stopped by an Alabama State Trooper, who although he observed the fact that the driver had been drinking, arrested him only for speeding and then released him from his custody to allow him to resume his travels upon the public highways.

The complaint charges the Alabama State Trooper, and through him the Highway Patrol Division of the Alabama Department of Public Safety, with negligently contributing to cause the accident. The District Court dismissed the complaint as to the Alabama Department of Public Safety on the ground it was an unconsented suit against the State of Alabama, not permitted by the Alabama Constitution. The Court further found no merit in the arguments of

plaintiffs that the Eleventh Amendment to the United States Constitution was impliedly repealed as to suits of this type by the Fourteenth Amendment.

After some additional proceedings, plaintiffs voluntarily dismissed claims against all remaining defendants and took this appeal as to the District Court's dismissal of the Alabama Department of Public Safety.

The Fifth Circuit affirmed the District Court without opinion, despite the fact that between the time the appeal was taken and the time all briefs were filed before the Fifth Circuit, the Supreme Court of the United States decided *Fitzpatrick v. Bitzer*, 44 LW 5120, ... U.S. ..... (June 28, 1976). Plaintiffs argued in their reply brief and now argue here that the *Fitzpatrick* decision demonstrates the complete loss of viability of the sovereign immunity doctrine and mandates a reversal in this case.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. *Important Question of Federal Law*

As against the shield of sovereign immunity afforded the State of Alabama by the Eleventh Amendment, *Edelman v. Jordan*, 415 U.S. 651 (1974), do Federal Courts nevertheless have the power under the Fourteenth Amendment to enter an award against a State where the only defense asserted by the State is one which contravenes the substantive guarantees of the Fourteenth Amendment? This Court decided in *Fitzpatrick v. Bitzer, supra,* that monetary relief may be awarded against a State where specifically authorized by Congressional legislation passed pursuant to the authority of §5 of the Fourteenth Amendment. Just as the Federal Courts have power to award damages against a State where Congressionally authorized under §5 of the Fourteenth Amendment, shouldn't the

Federal Courts also have that power to authorize damages where the only defense pleaded by the State is one rendered constitutionally impermissible by the Fourteenth Amendment? The defense of sovereign immunity asserted by Alabama to bar the claims of the Kentucky plaintiffs is contradictory to the Fourteenth Amendment because it is a classification which serves to penalize their exercise of the right to interstate travel and denies a judicial forum for redress of grievances, without being shown necessary to promote a compelling governmental interest. Is there a compelling governmental interest in a doctrine which immunizes State agencies for tortious conduct of its agents, and tends toward governmental irresponsibility? In view of the conceded power to restrict unconstitutional State activity, *Ex parte Young*, 209 U.S. 123 (1909), and the holding in *Fitzpatrick* that the Eleventh Amendment is limited by the Fourteenth Amendment, isn't it a natural extension of the *Fitzpatrick* doctrine that damage awards be allowed against States where the only defense asserted is one rendered constitutionally impermissible by the Fourteenth Amendment?

2. *Apparent Conflict with Fitzpatrick Decision*

In *Fitzpatrick*, this Court said, "Our analysis begins where *Edelman*[1] ended." These Kentucky plaintiffs submit that the present decision is contrary to the *Fitzpatrick* ruling. There is a need for clarification for the benefit of all parties to the dispute and for the basic welfare and interest of the Nation.

[1]*Edelman v. Jordan*, 415 U.S. 651 (1974).

ARGUMENT

I.

It is constitutionally impermissible for Alabama to use sovereign immunity to shield against common-law claims asserted by Petitioners who allege that Alabama injured them while Petitioners were engaged in interstate travel.

A. The United States Constitution is the supreme law of the land, and prevails over a contrary provision in the Constitution of Alabama.

Federal power which is constitutionally exerted for the protection of public or private interests, or both, becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a State merely because it will apply some doctrine of private right. *Garner v. Teamsters*, 346 U.S. 485 (1953). If a State constitution prohibits the exercise of a Federal Constitutional right, the State constitution is itself unconstitutional. *Miller v. State of Oklahoma*, 363 F.2d 843 (1966). Article I, §14 of the Alabama Constitution prohibits the Kentucky plaintiffs from suing the State of Alabama for injuries caused by State employees while these Kentucky plaintiffs were engaged in interstate travel. The Kentucky plaintiffs are thus denied a forum for redress of their grievances against the State, and their exercise of the right of interstate travel is penalized. Thus, the Kentucky plaintiffs are before this Court asking that the barrier of State liability for the torts of State employees be struck down, because, in the words of the Alabama Supreme Court (in judicially striking down municipal immunity):

> The rule of governmental immunity . . . bottomed, as it is, on the English concept that the 'King can do no wrong,' is the antithesis of the very concepts upon

which our government was founded. In fact, recent events have demonstrated dramatically that the 'King can do wrong' in America; and when he does, he must pay the penalty for such wrongdoing. *Jackson v. City of Florence,* 294 Ala. 592, 320 So.2d at 73 (1975).

If governmental immunity is outdated, then there no longer is a compelling governmental interest opposed to the Federal rights to interstate travel and forum for redress of grievances. The Kentucky plaintiffs are therefore being denied due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution, a practice which must be abated by striking down Article, §14 of the Alabama Constitution.

B. The classification of all suits against Alabama as being prohibited is a classfication which serves in this case to penalize the exercise of the right of interstate travel and the right to judicial forum for redress of grievances of the Kentucky Plaintiffs.

The governing Constitutional test in this case is whether or not Alabama's classification made under color of State law bears a rational relation to legitimate State interests. *Shapiro v. Thompson,* 394 U.S. 618 (1967). In *Shapiro,* this Court stated:

> . . . any classification which serves to penalize the exercise of that right [interstate travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. 394 U.S. at 634.

The right of interstate travel is penalized as to these Kentucky plaintiffs, because no matter what tortious wrongs are committed against them by State employees or State agencies during their travels through the State, no

remedies are permitted and no forum provided. Just as the *Shapiro* case established the right of interstate travel to be a fundamental Federal right, plaintiffs here submit that the right to some type of judicial forum for redress of grievances is guaranteed under the doctrine of *Canadian Northern Railway Co. v. Eggen,* 252 U.S. 553 (1920). Since Alabama enfringes on both rights by its discrimination against that class of claims presented against itself, the State has a burden under *Shapiro* to justify this classification by compelling State interests. Should the attempted justification fail, the classification must also fail and Article 1, §14 of the Alabama Constitution be admitted to be violative of the Fourteenth Amendment rights of the Kentucky plaintiffs.

C. There is no compelling governmental interest in a classification which immunizes state agencies for negligent or tortious conduct, and tends toward governmental irresponsibility.

Several justifications Alabama could possibly advance have already been tossed out by precedents in this Court and others around the country. The objective of facilitating budget predictability was advanced by the District of Columbia in *Shapiro,* but tossed out by the Court. The objective of avoiding a heavy work load on the State Courts and administrative machinery was considered and tossed out by the Pennsylvania Supreme Court in the 1973 decision that struck down sovereign immunity in that State, *Ayala v. Philadelphia Board of Education,* 305 A.2d 877 (1973). There, the Court stated:

> We obviously do not accept the 'too much to do' rationale. We place the responsibility exactly where it should be: not denying relief to those who have been injured, but on the judicial machinery of the

commonwealth to fulfill its obligations to make itself available to litigants. Who is to say which litigants will be denied access to our courts because of speculation that the work load will be a burden? Certainly this Court is unwilling to allow such considerations to influence a determination whether a class of litigants will be denied or permitted to seek adjudication of its claim. *Id.*, at 882, 883, *citing* 261 A.2d at 89.

Further, in tossing out the doctrine of sovereign immunity on September 26 of 1975, the New Mexico Supreme Court added:

> The argument has been presented that the litigation of sovereign immunity will result in an intolerable financial burden upon the State. We believe it is safe to say that adequate insurance can be secured to eliminate that possible burden in a satisfactory manner. In addition, it would appear that placing the financial burden upon the State, which is able to distribute its losses throughout the populace, is more just and equitable than forcing the individual who is injured to bear the entire burden alone.[2]

If a person acting in a private capacity causes injury, the injured party will have right of redress against the person. If the State causes the same injury, the party is left without remedy. Not only is a rational basis for such a result absent, but fundamental notions of fairness agitate against it. In short, there is no compelling State interest. In the words of the Louisiana Supreme Court which abrogated sovereign immunity in the 1973 case *Board of Commissioners v. Splendour:*

> It is unfair. It tends toward governmental irresponsibility.[3]

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[2]*Hicks v. State of New Mexico*, 544 P.2d 1153, 1155 (1975).
[3]273 So.2d at 25 (1973).

In overturning the doctrine of sovereign immunity in Kansas in January of 1975, the Kansas Supreme Court stated:

> Liability is the rule for negligent or tortious conduct, immunity is the exception. But when the tortfeasor is a governmental agency, immunized from liability, the injured person must forego his right to redress unless within a specific exception. Equality is not achieved by artificial exceptions which indiscriminately grant some injured persons recourse in the Court and arbitrarily denies such relief to others. (Citation omitted). The operative effect of such arbitrary distinctions are incompatible with the Constitutional safeguards established by both the Federal and Kansas Constitutions.[4]

Accordingly, the Kansas Supreme Court held that the Kansas statutes creating governmental immunity to be:

> . . . unconstitutional and void as a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution and Sections 1 and 2 of the Kansas Bill of Rights.[5]

Budget predictability could be facilitated in Alabama as in any of those States which have tossed out sovereign immunity. For that matter, Alabama could follow the example of the larger corporations in purchasing liability insurance with a certain level premium, should it not wish to administer a tort claims program under its own agencies. Regardless of the method the State chooses to follow, it must not perpetuate its use of the unconstitutional defense of sovereign immunity. In the words of the Supreme Court of Colorado, which discarded sovereign immunity in 1971:

> . . . (T)he two cornerstones of sovereign and governmental immunity were wrong when announced and

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[4]*Brown v. Wichita State University*, 217 Kan. 279, 297.
[5]*Id.*, at 297.

> they are wrong today; repetition of them 40 times or 400 times doesn't make good law or cause the reasons for the doctrines to become any stronger. In any event, if the doctrines were not wrong when some or all of these decisions were written, they are now.[6]

The sovereign immunity doctrine, in short, no longer satisfies the requirement of a compelling State interest so as to permit its use to bar these Kentucky plaintiffs. Such use would be an infringement upon the fundamental rights of interstate travel and right to forum for judicial redress of grievances, and thus a denial of equal protection of the laws and due process of law.

II.

Federal Courts have both the power and the duty to prohibit Alabama's unconstitutional blocking of the claims of the Kentucky plaintiffs, even if the net result is an award of damages from the State's Treasury.

A. The Eleventh Amendment, giving immunity to Alabama from suits by plaintiffs in Federal Court, is limited by the equal protection guarantees of the Fourteenth Amendment, which protect the right of interstate travel and guarantee a forum for redress of grievances.

Federal Courts were given the power to entertain cases between a State and citizens of another State by Article III, §2 of the United States Constitution. In 1793, the United States Supreme Court decided that a State could be sued in Federal Court without its consent in *Chisholm v. Georgia.*[7] In *Chisholm,* Justice Wilson wrote a lengthy opinion suggesting the inapplicability of the monarchistic doctrine

[6] *Evans v. Board of County Commissioners of the County of El Paso,* 482 P.2d 968 (Colo. 1971).

[7] 2 U.S. (2 Dall.) 419 (1793).

of sovereign immunity in the Republican polity of America, reasoning on philosophical and analytical grounds as well as from the language of Article III.[8] Chief Justice Jay, in a concurring opinion, discussed the differences between sovereignity in a monarchy and in a republic, and concluded that amenability to suit was not inconsistent with the latter.[9] The holding of *Chisholm* was overturned in 1798 by the Eleventh Amendment, which restricted the judicial power of the United States from extending to, *inter alia,* suits against a State by citizens of another State.

While the effect of the Eleventh Amendment was to restrict judicial jurisdiction, it did not affect the persuasiveness or viability of the arguments against the doctrine of sovereign immunity contained in *Chisholm.*

The Fourteenth Amendment, following later in time to the Eleventh Amendment, serves to repeal so much of the Eleventh Amendment as is inconsistent with it. In *Fitzpatrick,* this Court reviewed the line of cases beginning with *Ex parte Virginia,* 100 U.S. 339 (1880),[10] and concluded:

> But we think that the Eleventh Amendment, and the principle of State sovereignty which it embodies (Citation omitted) are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment.[11]

Nothing in the language of the Fourteenth Amendment, however, restricts Federal judicial enforcement of the Fourteenth Amendment to those situations where Congress has acted pursuant to §5. Indeed, as the opinion in *Fitzpatrick* stated:

[8] *Id.,* at 453, *et seq.*

[9] *Id.,* at 469-73.

[10] *Fitzpatrick v. Bitzer,* 44 LW at 5122, 5123.

[11] *Id.,* at 5123.

> When Congress acts pursuant to §5, not only is it exercising Legislative authority that is plenary within the terms of the constitutional grant, *it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on State authority.* (Emphasis added)[12]

Where the people of the United States have, through the Fourteenth Amendment, specifically limited State authority in order to protect certain individual liberties, Federal judicial enforcement is inherently authorized, and to the extent such enforcement runs counter to the Eleventh Amendment, the latter is necessarily limited. The thrust of the holding in *Fitzpatrick* is identical to that advanced by the petitioners here. If the Fourteenth Amendment has limited the Eleventh Amendment whenever fundamental rights guaranteed by the Fourteenth Amendment are involved, then the Court held in *Fitzpatrick* that Federal Courts may judicially intrude when ever there has been Congressional legislation within the purview of §5. The Fourteenth Amendment, however, goes further than that. Its viability is not dependent upon Congressional legislation. The judiciary is a co-equal branch of our Republic and is empowered under the Fourteenth Amendment to exercise its own initiatives, where procedures allow, to enforce the liberties guaranteed by that Amendment. If a State infringes upon those liberties, then the protections afforded a State by the Eleventh Amendment are not available to shield against the power of the Fourteenth Amendment. Federal Courts have both the power and the duty to prohibit Alabama's unconstitutional blocking of the Kentucky plaintiffs, even if the net result is an award of damages from the State's Treasury, because to

[12] *Id.*

act otherwise would be to allow Alabama to infringe upon the petitioners' Fourteenth Amendment rights of interstate travel and forum for redress of grievances. The seventeen year old human vegetable in this case with permanent brain damage as a result of the negligence of Alabama's State Trooper should properly be a financial responsibility of Alabama rather than a financial burden on his family.

CONCLUSION

For the foregoing reasons, it is respectfully submitted:

1. This Petition for a Writ of Certiorari should be granted.

2. This case should be set down for argument at the earliest practicable time.

3. An order should be issued reversing the United States Court of Appeals for the Fifth Circuit and remanding this case to the United States District Court for the Middle District of Alabama for trial on the merits.

Respectfully submitted

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GLENN MCDONALD, ESQUIRE and
HOGAN, SMITH AND ALSPAUGH
Attorneys for Petitioners

By: R. Ben Hogan III
R. BEN HOGAN, III

CERTIFICATE OF SERVICE

I, Roscoe B. Hogan, one of the attorneys for Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of November, 1976, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the following opposing counsel by mail:

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APPENDIX

APPENDIX I

DECISION OF FIFTH CIRCUIT
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2455
Summary Calendar*

WILLIAM H. PERKINS, an individual, ET AL.,
Plaintiffs-Appellants,

versus

TROOPER DAN J. SANSOM, an individual, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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(August 27, 1976)

BEFORE COLEMAN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX II

DISTRICT COURT OPINION
IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

WILLIAM H. PERKINS; ET AL,	)	
Plaintiffs,	)	
Vs.	)	CIVIL ACTION
TROOPER DAN J. SANSOME:	)	NO. 75-316-N
ET AL,	)	
Defendants.	)	

ORDER

This cause is now presented to the Court on the motions to dismiss filed herein September 9, 1975, by Defendants, Dan J. Sansom and Highway Patrol Division of the Alabama Department of Public Safety, and filed herein September 24, 1975, by Defendant, The Spread, Inc.

Defendant Highway Patrol contends that as against it the present action is an unconsented suit against the sovereign. This Court finds nothing in the recent decisions of the Alabama Supreme Court as cited by Plaintiffs that suggests that the State of Alabama has consented to be sued in the chacter of its instrumentality, the Highway Patrol Division. The Court also finds no merit in the argument of Plaintiffs that the Eleventh Amendment to the United States Constitution has been impliedly repealed as to suits of this type by the Fourteenth Amendment. Accordingly, it is

ORDERED that the motion to dismiss filed herein by Defendant Highway Patrol be, in the same is hereby,

granted, and the said Highway Patrol Division of the Alabama Department of Public Safety is hereby dismissed as a party Defendant to this cause of action. It is further

ORDERED by this Court that the motions to dismiss filed herein by Defendants, The Spread, Inc., and Dan J. Sansom, be, and the same are hereby, denied.

DONE this *19th* day of January, 1976.

/s/ R. E. VARNER

UNITED STATES DISTRICT JUDGE